REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCOMMM E 100 OF 2021

NGUGI MBUGUA.....1st PLAINTIFF

ESTHER NJERI WAWERU.....2nd DEFENDANT

VERSUS

PROGRESSIVE CREDIT LIMITED.....DEFENDANT

RULING

INTRODUCTION

1. A summary of the Plaintiffs' case as enumerated in their Plaint dated **19th** February 2020 is necessary in order to put the instant application into a proper perspective. The Plaintiffs case is that on **27th** day of February 2019 they signed a financing agreement with the defendant for a loan of **Kshs. 6,000,000/=** repayable within **12** monthly instalments of **Kshs. 776,000/=** inclusive of principal and interests W.E.F. **30th** March 2019 to **1st** March 2020. The Plaintiffs aver that under the agreement, the facility would attract interest from the date of draw down at a flat rate of **4.6%** of the principal amount per month, with the defendant reserving the right to amend the interests without prior notice to the Plaintiffs.

2. The Plaintiffs aver that the agreement provided that if the borrowers fail to pay any sum payable under the facility on its due date, the borrowers would pay interest on such sums from the date of such failure to the date of actual payment at the rate of **2%** of the principal amount per month. The security for the loan was a legal charge over **LR No. SIGONA/1271** and Motor Vehicle **KAK 986L** and household chattels. The Plaintiffs state that as at **13th** October, 2020 they had repaid **Kshs**. **3,052,000/ =.**

3. The Plaintiffs contend that the defendant has violated *Indiplum Rule* under section **44A** of the Banking Act[1]under which a lender cannot recover an amount more than double the outstanding principal. They state that contrary Central Bank Regulations, on **25th** day of January 2021, M/S Carnelian Enterprises Auctioneers instructed by the defendant issue a **45-**days' notice to the Plaintiffs demanding payment of **Kshs. 12,317,000**/=, in default, the security would be auctioned.

4. They contend that the said process is illegal, unlawful and violates mandatory provisions of the Banking Act and is likely to cause grave prejudice, massive loss, and loss of the **1st** Plaintiff's matrimonial home unless this court intervenes. As a consequence, the Plaintiffs pray for a declaration that the Loan Agreement dated **27th**February 2019 is illegal, and unlawful for violates mandatory provisions of section **44A** of the Banking Act which limit interests recoverable on defaulted loans.

5. The Plaintiffs also pray for an order directing the defendant to produce detailed accounts of the disbursement and repayment of the loan facility advanced to the Plaintiffs w.e.f. **27th** February 2019 to date. They also pray for a permanent injunction restraining the defendant, its agents or anyone acting on their behalf from selling, advertising for sale, transferring, evicting, mortgaging, charging or interfering in any manner whatsoever with LR NO. SIGONA/ 1271. Lastly, the Plaintiffs pray for costs of this suit.

6. Contemporaneous with the Plaint, the Plaintiffs filed an application of even date praying that pending hearing and determination of this suit the defendant or its agents be restrained from advertising for sale or in any manner dealing with the charged property or any other assets belonging to the applicants. They also prayed for an order that this court orders that they be provided with a detailed statement of accounts of the loan facility including amount repaid and interest charged from **27th** February 2019 to date. Also, they prayed for costs of the application to be provided for. The other prayers in the application are spent.

7. The grounds in support of the application are essentially a replica of the averments in the Plaint. It will add no value to rehash them here. Additionally, the Plaintiffs averred that the Actioners are likely to proceed with the auction without an independent valuation report, and that, the property is the matrimonial home and the loss of the property cannot be compensated by an award of damages.

8. They also state that they have established a *prima facie* case with a probability of success. Also, that they have established a right which has been infringed by the defendant. They state that they serviced the loan up to October 2020, and severally they urged the defendant to restructure the loan and so far, they have paid **Kshs. 3,052,000/=.**

9. They dispute that the defendant issued them with a statutory notice, but instead it irregularly instructed Auctioneers to issue a **45**-day notice. Lastly, they state that they are apprehensive that the property will be advertised for sale and or will be sold without due process unless the orders sought are granted.

The defendant's Response

10. The application is opposed. The defendant's opposition is contained in the Replying affidavit of Collins Muhla, its Legal Officer dated **9th** March 2021. The nub of the affidavit is that the Plaintiffs admitted in their pleadings that they are indebted to the defendant; that, they admitted they were served with all requisite statutory notices as required under the Land Act,[2] and that the defendant has a right to exercise its Statutory Power of Sale which right has crystalized.

11. It is the defendant's case that upon receipt of the Plaintiffs loan application, the defendant vide a letter of offer dated **27th** February 2019 offered the Plaintiffs a loan facility of **Kshs. 6,000,000/=** repayable by **12** equal monthly instalments of **Kshs. 776,000/=** from **30th** March 2019 at **4.6%** interest per month. Further, that, the Plaintiffs offered **LR No. SIGONA 1271** and Motor Vehicle Registration No. **KAK 986L** as security and a charge was registered over the said title in the defendant's favour. Further, despite the clear provisions of the charge and letter of offer, the Plaintiffs defaulted in repaying the loan.

12. The defendant contends that on **10th** June 2019, it issued a demand letter to the Plaintiff demanding loan arrears of **Kshs. 806, 000/=,** but the Plaintiffs continued to default. As a consequence, it initiated recovery process and issued a **90**-days Statutory Notice on **20th** August 2019 and a **40** days' Notice to Sell on **16th** December 2019 which were served upon the Plaintiffs at their last known registered address. However, the Plaintiffs failed to comply causing the defendant to instruct a valuer to value the property who upon undertaking the valuation prepared a report dated **24th** September 2020.

13. It is the defendant's case that by a letter dated **20th** January 2021, it instructed auctioneers to undertake the sale and on **28th** January 2021 they issued the **45** days' Redemption Notice which was served personally upon the Plaintiffs together with the **45** days Redemption Notice via registered post on **29th** January 2021.

14. Additionally, it was averred on behalf of the defendant that an injunction ought not to issue if there is default in repaying the loan. Further, an injunction would occasion injustice to the defendant by restraining it from exercising its statutory power of sale which has arisen. Also, that the defendant has not violated section **44A** of the Banking Act as alleged because being a non- deposit taking microfinance institution governed by the Microfinance Act[3] the said provision is inapplicable.

15. Further, a dispute on accounts is not a basis for grant of an injunction nor can a court interfere with the terms of a contract entered into freely by the parties nor have the Plaintiffs who are still in default demonstrated prejudice. That, the statutory notices were validly issued and that the Plaintiffs acknowledged service of the Statutory Notice, hence they have not come to court with clean hands.

Plaintiffs'/applicant's advocates submissions

16. The Plaintiffs'/applicants' counsel submitted that the defendant violated section **44A** of the Banking Act because it cannot recover at any one given time an amount in excess of double the outstanding loan, thus, it violated the *Indiplum Rule*. Counsel relied on *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited*[4] and argued that interest of **4.6%** per month amounts to an unconscionable contract.

17. Also, counsel argued that the process is tainted with illegality and it is likely to cause grave prejudice, massive loss, loss of the **1st**Plaintiffs matrimonial home and the land on which the home stands. He argued that the **45** days' notice issued by the Respondent's is illegal and no statutory notice was ever issued, and that only the **45** days' notice was issued by the auctioneers.

18. Additionally, counsel submitted that the Plaintiffs demand that they be provided with the statement of accounts which the defendant has refused to supply, hence, order **20** Rule **1** of the Civil Procedure Rules, an order for the proper accounts is necessary. (Citing *Margaret Njeri Muiruri v Bank of Baroda (Kenya Limited*[5]). Lastly, he submitted that a borrower whose security is sold without compliance with the Statutory Power of Sale will definitely suffer irreparable loss.

The defendant's advocates submissions

19. The defendant's counsel submitted that the Plaintiff has not established a *prima facie* case as defined in *Mrao Limited v First American Bank of Kenya and 2 others*.[6] He argued that the Plaintiff has not demonstrated why an injunction should be granted. Counsel cited *Kenya Commercial Bank Ltd v Pamela Akinyi Ochien'g*[7] which held that the mortgagee will not be restrained from exercising its statutory power of sale because the mortgage debt is in dispute.

20. Additionally, counsel submitted that the applicants have not proved that they will suffer irreparable injury which cannot be compensated by damages. He relied on *Muigai v Housing Finance Co Ltd & another*[8] for the holding that where damages may be an appropriate

remedy, an interlocutory injunction should never issue. He cited *Maithya v Housing Finance Co of Kenya & Another*[9]for the proposition that loss of properties through sell is contemplated even before the security is formalized. He argued that the Plaintiffs voluntarily charged the subject property and they were aware that in the event of default in servicing the loan facility, it would be sold. Counsel cited *Andrew Muriuki Wanjohi v Equity Building Society Ltd*[10] which held that whenever a borrower offers his property as security, he is aware that in the event of default, it would be sold.

21. The Plaintiffs' counsel submitted that the balance of convenience is in favour of the defendant and cited *Paul Gitonga Wanjau v Gathumbi Tea Factory Company Ltd*[11] which laid down the applicable tests in determining the balance of convenience. Counsel argued that the right to exercise Statutory Power of Sale has crystalized and cited *Halsbury's Laws of England*[12] for the position that the mortgagee will not be restrained from exercising its power of sale because the amount due is in dispute or because the mortgagee has begun a redemption action or because the mortgagor pays the amount claimed in court unless the amount is excessive.

22. Counsel submitted that the application is misconceived, scandalous and frivolous and if granted, the injunction will cause injustice to the defendant. He cited *Jopa Villas v Private Investments Corporation & 2 others* which upheld the need for courts to uphold the sanctity of lawful commercial transactions especially where an applicant is running away from its obligations. He argued that the Plaintiff has not been servicing the facility, that the Statutory Notices were properly served and that the Plaintiffs have come to court with unclean hands. Citing *Pius Kimaiyo Langat v Co-operative Bank of Kenya*[13] counsel argued that courts cannot rewrite contracts between the parties. He argued that despite admitting being served with the Statutory Notice, the Plaintiffs never took steps to remedy the situation.

23. Regarding the argument that the defendant violated section **44A** of the Banking Act, counsel argued that defendant is a non-deposit taking micro-finance institution governed by the Microfinance Act and therefore it is not bound by the interest rate capping under the said section. To fortify his argument, counsel cited *Kings Group of Schools Limited & Another v Kenya Women Microfinance Bank Limited*[14] which reiterated that non-deposit taking micro-finance institutions are governed by the above statute. Further, he submitted that a court of law cannot re-write a contract between parties.

Determination

24. A useful starting point is to mention that the purpose of an interlocutory injunction is to preserve the subject matter of a dispute and to maintain the *status quo* pending the determination of the parties' rights. In granting such an injunction, the court is concerned both with: (a) the maintenance of a position that will most easily enable justice to be done when its final order is made; and (b) an interim regulation of the acts of the parties that is the most just and convenient in all the circumstances.

25. Even though the jurisdiction to grant injunctions is discretionary and very wide, this power does not confer an unlimited power to grant injunctive relief. This is because regard must still be had to certain prerequisites. These are the existence of a legal or equitable right which the injunction protects against invasion or threatened invasion, or other unconscientious conduct or exercise of legal or equitable rights.

26. A general rule has long been established in relation to applications to restrain the exercise by a mortgagee of powers given by a mortgage and in particular the exercise of a power of sale, that such an injunction will not be granted unless the amount of the mortgage debt, if this not be in dispute, be paid or unless, if the amount be disputed, the amount claimed by the mortgagee be paid into court.[15] There are a number of exceptions to the general rule: (a) where the amount claimed by the mortgagee is plainly wrong; (b) where there is doubt as to the existence of the power of sale or doubt as to whether it has become exercisable at all; and (c) where the validity of the mortgage is being challenged.

27. The primary analysis as to whether the power of sale has become exercisable focuses on the terms of the facility, any re-negotiations of those terms and whether the machinery provisions in those facilities and otherwise set out in statutes have been complied with.

28. In an application for an interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The jurisdiction to grant an injunction may be exercised "if it is just and convenient to do so." In *Giella v Cassman Brown and Co. Ltd*[16] the court set out the principles for Interlocutory Injunctions. The principles laid down in the said case are: -

*a. The Plaintiff must establish that he has a **prima facie** case with high chances of success;*

b. That the Plaintiff would suffer irreparable loss that cannot be compensated by an award of damages;

c. If the court is in doubt, it will decide on a balance of convenience.

29. The Canadian case of *R. J. R. Macdonald v Canada (Attorney General)*[17]laid down three-part test of granting an injunction as follows: -

a. Is there a serious issue to be tried?

b. Will the applicant suffer irreparable harm if the injunction is not granted?

c. Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience").

30. Back at home in *Mbuthia v Jimba Credit Corporation Ltd*[18] Platt JA echoed the "serious question to be tried" test enunciated by Lord Diplock in *American Cyanamid* [19] and stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only needs to weigh the relative strength of the party's cases. The seriousness of the question, like the

strength of the probability, depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought. How strong that probability (or likelihood) needs to be depends, no doubt, upon the nature of the rights the plaintiff asserts and the practical consequences likely to flow from the order he seeks.

31. Also relevant is Lord Hoffman's exposition of the law in *Films Rover International Ltd v Cannon Film Sales Ltd*[20] that in determining whether to grant an interlocutory injunction, a court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong," in the sense of granting an injunction to a party who fails to establish his or her right at trial (or would fail if there was a trial) or in failing to grant an injunction to a party who succeeds (or would succeed at trial). In determining which course carries the lower risk of injustice, the court is informed by, among other things, the well-established interrelated considerations of whether there is a serious question to be tried and whether the balance of convenience or justice favours the grant.

32. To justify the imposition of an interlocutory injunction, the plaintiff must be able to show a "sufficient likelihood of success." The plaintiff's prospects of succeeding at trial will always be relevant "as a necessary part of deciding whether there is a serious question to be tried" and as an almost invariable factor in evaluating the balance of convenience. The assessment of the strength of the probability of success is an essential factor in deciding which course - whether or not relief should issue and, if so, on what terms – carries the lower risk of injustice. While this is the case, it is suggested that there will be other factors which are relevant having regard to the nature and circumstances of the case.

33. The *prima facie* case test represents the law in relation to the grant of interlocutory injunctions. A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is sufficient that the plaintiff shows a sufficient likelihood of success to justify in the circumstances the preservation of the *status quo* pending the trial rather than demonstrating that it was more probable than not that the plaintiff would succeed at trial. In *Mbuthia v Jimba Credit Corporation Ltd* (supra) Platt JA stated that in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law but only *needs to weigh the relative strength of the parties cases.*

34. The following excerpt from *Interlocutory Injunctions: Practical Considerations"*[21] is useful: -

> *"With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald v Canada (Attorney General)*[22]*"Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits."*[23] *It is usually a brief examination of the facts and law.*
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> *In certain circumstances, the court will impose a more restrictive standard and require the moving party to demonstrate that it has a stronger prima facie case. If the injunction will likely end the dispute between the parties, then the court may hold the plaintiff to this higher standard. Similarly, where the nature of the relief sought is mandatory, or when the question is a question of mere law alone, then this higher standard will apply..."*

35. Turning to the facts of this case, the first question is whether the defendant's Statutory Power of Sale has arisen. Where it is demonstrated that there is a strong *"prima facie"* case as to whether the power of sale had arisen and become exercisable, then grant of an injunction is favored.[24]It must be accepted that exercise of Statutory Power of Sale which has arisen in itself is not an odious thing. It is part and parcel of normal legal process. It is only when there is disproportionality between the means used in its exercise compared to law, that alarm bells should start ringing. If there are is no illegality in the manner in which the Statutory Power of sale is being exercised, its exercise may not be avoided unless an illegality or fraud is demonstrated. Put differently, there must be a question as to whether there exist circumstances which affect the power of sale. For example, it seems to me that the power of sale is not to be exercised in circumstances where there would be a fraud on the power. It might be a fraud on the power to exercise it in circumstances where the mortgagee itself has been guilty of conduct which strongly contributed to the mortgagor's default, which default is the basis for the power of sale. My reading of the reasons cited leave no doubt in my mind that the applicants have not demonstrated brought their case within the ambit of the foregoing considerations. Differently put, there is nothing to show that the defendant's statutory power of sale has not validly arisen.

36. The other ground cited by the Plaintiffs is that the subject property constitutes matrimonial home. This reason has of late become a recurrent argument in arguments of this nature. *First*, it must be accepted that exercise of Statutory Power of Sale which has arisen in itself is not an odious thing. It is part and parcel of normal legal process. It is only when there is disproportionality between the means used in its exercise compared to law, that alarm bells should start ringing. If there are is no illegality in the manner in which the Statutory Power of sale is being exercised, its exercise may not be avoided just because the security constitutes a matrimonial home. At the time the Plaintiffs offered the property as security, they were fully aware of the legal consequences.

37. *Second*, to put matrimonial property into that class of assets beyond the reach of exercise of lawful Statutory Power of Sale has the effect of sterilizing such properties from commerce, thereby rendering matrimonial homes useless as a means of raising credit for the benefit and advancement of the property owners. *Third*, such an argument, if accepted has the adverse effect of locking up capital and prevent the home owning entrepreneur from using his or her home as security to finance business initiative. Entertaining such an argument would suggest that the law is relentlessly one-sided and concerned with nothing more than devolving rights and benefits on borrowers without any regard for the interests of credit providers. For just as the law seeks to protect borrowers, so too does it seek to promote a competitive, sustainable, efficient and effective credit industry. *Fourth*, there is no rule of law that matrimonial property once offered as security is shielded from the exercise of statutory power of sale in the event of default.

38. The applicants do not deny that the amount is due. In fact, they admit having requested for rescheduling of the loan, a confirmation of their default. They have disclosed the amount paying, thus confirming that they are in arrears. The question whether or not they breached a valid loan agreement. Now that the Plaintiffs are in default, the pertinent question is whether the defendant's statutory power of sale has arisen. Put differently, did the defendant legally seek to realize the security. Is the intended sale lawful? Guidance can be obtained in *Woodcraft Industries Ltd & 3 others v EAST African Building Society*[25] which held:- *"to give an injunction to restrain a party from*

exercising a statutory power of sale which has arisen and is exercisable on the basis that it would be harsh to the borrower for whatever reason, in whichever circumstances would be, to my mind, shirk judicial responsibility to enforce contractual rights. It would be to render securities useless."

39. Equity is also loath to intervene where there is default or the borrower is in clear breach of his obligations under the charge instrument. All those factors tell against granting an injunction in the instant case. Viewed from the lens of what constitutes a *prima facie* case, I find no difficulty in concluding that the applicants have not demonstrated a *prima facie* case with a likelihood of success.

40. The applicants are challenging the interests. Other than invoking the *induplum rule*, very little was said to demonstrate this allegation. On the contrary, granting the relief might only worsen applicants' position. This is because if the interest is accumulating and there is little prospect it can be paid, then restraining the sale can only worsen the mortgagor's position and this weighs against an injunction.[26] In any event, default in payment, weighs against an injunction. Additionally, how long has the lender been kept out of its money is a factor which militates against relief.

41. The other test is whether the applicant has demonstrated irreparable harm. The following excerpt from *Halsbury's Laws of England*[27] is relevant. It reads: -

> *"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"*

42. In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured.[28] **Robert Sharpe**, in *"Injunctions and Specific Performance,"*[29] states that *"irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."* In my view, the applicants have not established that if the sale proceeds, they cannot be adequately compensated by way of damages. In fact, the contrary is true. In the event of the auction proceeding, the applicants' loss (if any) can be quantified into monetary terms. In my view, the facts of this case are crystal clear that the applicant has failed to demonstrate irreparable harm.

43. The third test is balance of convenience. Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right.[30] The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant.[31]

44. Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If an applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the *status quo* in determining where the balance on convenience lies.

45. If the court is satisfied that there is a serious question to be tried, (or that the plaintiff has made out a *prima facie* case) and that damages are not an adequate remedy, it must go on to consider whether the balance of convenience or justice favours the grant of an injunction. The balance of convenience is the course most likely to achieve justice between the parties pending resolution of the question of the applicant's entitlement to ultimate relief, bearing in mind the consequences to each party of the grant, or refusal, of the injunction. The strength of the applicant's case is relevant in determining where the balance of convenience lies. Where an applicant has an apparently strong claim, the court will more readily grant an injunction even when the balance of convenience is evenly matched. A weaker claim may still attract interlocutory relief where the balance of convenience is strongly in favour of it. The assessment of the likelihood of the plaintiff being successful at trial is critical in determining the first element. I have carefully applied the foregoing tests to this case. It is my conclusion that the balance of convenience is in favour of refusing the injunction.

46. An injunction is a discretionary remedy. As was held in *Kenleb Cons Ltd v New Gatitu Service Station Ltd & another,*[32] *"to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction*. In my view, the applicant has not established any wrong on the part of the defendant to warrant protection by an injunction. As was held *in Njenga v Njenga*[33] *"an injunction being a discretionary remedy is granted on the basis of evidence and sound legal principles*." From my analysis of the facts and the law discussed above and the conclusions arrived at, it is my finding that the applicants' application is unmerited. The applicants have failed to established the tests for granting the injunction sought.

47. I will now address the prayer for accounts sought in the application. This same prayer is prayed in the Plaint (see prayer 2 of the Plaint). The key question is whether the applicant is inviting this court to grant a final order at this interlocutory stage. Both counsels did no address this pertinent question. To my understanding, the answer to this question can be gleaned from the nomenclature employed in the said prayers. The said prayers are a replica of each other. The question is whether the said prayer as framed in the application is purely an interlocutory prayer. Should the court grant the said prayer as framed, will it have essentially determined the party's rights, i.e. the prayer in the Plaint. Will there be a dispute remaining for resolution regarding the said prayer? Put differently, the question is whether the order sought in the application is interlocutory or final. If it is interlocutory, it can be considered on merits.

48. Defining an interlocutory order is a useful starting point. A purely interlocutory order is one not having the effect of a final decree. In a wide and general sense, the term *"interlocutory"* refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and definitive effect on the main action; and (ii) those, known as "simple (or purely) interlocutory orders" or "interlocutory orders proper," which do not have a final effect on the main action.

49. Thus, when one reads the words *'interlocutory order'* one understands it normally in the context of many types of interlocutory orders. Some of which may be final with all the three attributes of a definitive judgment while others may even be rulings in the wider sense of the word. (I will discuss the three attributes shortly). If an interlocutory order has the three attributes normally used to determine whether the order in question is final in effect and definitive of the rights of the parties, then even if it is interlocutory in the wider sense, the order in question is final in effect. An order is purely interlocutory unless it anticipates or precludes some of the reliefs which would or might be given at the hearing.

50. A reading of the Plaint and the prayer sought in this application shows that it has all the three attributes of a final order. It is are not simple interlocutory order. The three attributes of a final order were set out by the South African Appellate Division in *Zweni v Minister of Law-and-Order*,[34] namely; (i) the decision must be final in effect and not susceptible to alteration by the court of first instance; (ii) it must be definitive of the rights of the parties, ie. it must grant definite and distinct relief; and (iii) it must have the effect of disposing of at least a substantial portion (if not all) of the relief claimed in the main proceedings. As was held in *Ashok Kumar Bajpai v Dr. (Smt) Ranjama Baipai*[35] the court should not grant interim relief which amounts to final relief except in exceptional circumstances where the court is satisfied that ultimately the applicant is bound to succeed, the court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party.

51. In *Burn Standard Co. Ltd. and Ors. v. Dinabandhu Majumdar and Anr*[36] the Supreme Court of India deprecated the practice of granting interim reliefs which amounts to final relief. The court however stated that in exceptional circumstances, where for one reason or the other court feels compulsion to grant an interim relief which amounts to final relief, the court must record reasons for passing such interim relief. Examples of such orders is a mandatory injunction. The prayer sought is not a mandatory injunction. It cannot be availed at this stage. In any event, even if I were to consider the said prayer, no material was placed before this court to demonstrate that the Plaintiffs requested for the Statements and the defendant refused to supply the same.

52. I find that the applicants' application dated **19th** February 2021 is unmerited. I dismiss the said application with no orders as to costs. In order to move this case forward, I direct the defendant to file their defense (if they have not filed within **14** days from today, after which the parties will be required to comply with pre-trial processes and fix the main suit for hearing not later than **120** days from the date of this ruling.

Orders accordingly

Signed and Dated at **Nairobi** this **24th** day of **June** 2021

John M. Mativo

Judge

Delivered electronically via e-mail

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[1] Cap 488, Laws of Kenya.

[2] Act No. 6 of 2012.

[3] Act No. 19 of 2006.

[4] {2014} e KLLR.

[5] {2014] e KLR.

[6] {2003} KLR 125.

[7] Civil Appeal No. 114 of 1991

[8] HCCC No 1678 of 2001.

[9] {2003}1EA 133 at p 139.

[10] {2006} e KLR.

[11] {2016} e KLR.

[12] Vol 32, 4th Edition, 725.

[13] {2017} e KLR.

[14] {2018}e KLR.

[15] See *Inglis v Commonwealth Trading Bank of Australia* (1972) 126 CLR 161; 46 ALJR 48; [1971] HCA 64, Walsh J at 164–165:

[16] {1973} E A 358.

[17] {1994} 1 S.C.R. 311.

[18] {1988} KLR 1

[19] {1975} AC 396 at 407.

[20] {1987} 1WLR 670 at 680-681.

[21] Steven Mason & McCathy Tetraut , available at www.mccarthy.ca.

[22] Supra

[23] Dole Food Co. Vs Nabisco Ltd {2000}, 8 C.P.R. (4TH) 461, (F.C.T.D.)

[24] See *Paul Douglas Williams v Abbot Australasia Pty Ltd [2002] NSWSC 950 (3 October 2002).*

[25] HCCC No. 602 of 2000

[26] See Emmanuel Orchards Pty Ltd v National Australia Bank Ltd (2003) 231 LSJS 118; [2003] SASC 368 at [42] per Bleby J.

[27]Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.

[28] Supra note 3.

[29] Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Cananda Law Book, 1992), P 2-27

[30] See Halsbury's Laws of England, Third Edition, Volume 21, paragraph 766, page 366.

[31] Ibid

[32] {1990} K.L.R 557

[33]{1991} KLR 401

[34] 1993 (1) SA 523 (AD).

[35] AIR 2004, All 107, 2004 (1) AWC 88, at paragraph 17.

[36] AIR 1995 SC 1499.